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In the Supreme Court of the United States

OCTOBER TERM, 1976

NORTH CAROLINA UTILITIES COMMISSION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a)[1] is reported at 537 F.2d 787. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 1b-41b) is reported at 45 FCC 2d 204.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1c-2c) was entered on April 14, 1976. The court of appeals denied petitions for rehearing and rehearing *en banc* on June 8, 1976 (Pet. App. 1d-2d). The petitions for a writ of certiorari were filed on September 3, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission's policy (adopted pursuant to the Communications Act of 1934) governing the interconnection of customer-provided equipment with the interstate telephone network precludes state adoption of inconsistent regulatory policies for such interconnections with the same facilities.

STATEMENT

Introduction

Telephone terminal equipment (which includes ordinary telephone sets as well as sophisticated switchboards and data communications facilities) serves

[1] "Pet. App." refers to the appendix in No. 76-332.

both interstate and intrastate functions. The same piece of equipment is used to send or receive local calls, intrastate long distance calls, interstate calls, and international calls. This is so because the national telephone network comprises all the local exchange areas in the country linked together by interexchange or long distance lines.

Two regulatory authorities, federal and state, oversee communications services and facilities. In a broad sense, the federal authority (the Federal Communications Commission ("FCC")) regulates interstate and foreign services, including the facilities used to provide those services; the state authorities (including the petitioner North Carolina Utilities Commission) regulate local exchange and intrastate toll services, including the facilities used to provide those services. This case arises from the FCC's resolution of a dispute as to which of the regulatory authorities is paramount in the circumstance where both have policies governing the interconnection of equipment to the telephone system and where the policies are irreconcilable. The FCC concluded that in such circumstances the federal responsibility for the interstate telephone network must prevail. The court of appeals affirmed.

A. The Statutory Scheme

In the Communications Act of 1934, 48 Stat. 1064 *et seq.*, as amended, 47 U.S.C. 151 *et seq.*, Congress created the FCC, with authority to regulate "interstate and foreign commerce in communication by wire and radio," and directed the agency to make

available "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *." Section 1, 47 U.S.C. 151. The grant of jurisdiction covers not only the transmission of interstate and foreign communications, but also "all instrumentalities, facilities, apparatus, and services * * * incidental to such transmission." Section 3(a), (b), (e), (f), 47 U.S.C. 153(a), (b), (e), (f).

The Act contemplates dual regulation of wire communications.[2] It expressly reserves state jurisdiction over purely intrastate matters, Sections 2(b), 221(b), 47 U.S.C. 152(b), 221(b); at the same time it specifically gives the FCC authority for certain regulatory purposes over all carriers who engage in interstate communications, including those who do so only through interconnection with other carriers, 47 U.S.C. 152(b). Under this regulatory scheme, such "connecting carriers", subject to state regulation in their roles as intrastate companies, are subject also to Sections 201 through 205 of the Communications

[2] The Act provides for consultation between the FCC and state regulatory commissions on matters of joint concern, Section 410, 47 U.S.C. (Supp. V) 410, and for the convening of a Federal-State Joint Board to consider proceedings concerning the separation of common carrier property and expenses between interstate and intrastate operations, and other proceedings that may be referred to it by the FCC. Section 410(c), 47 U.S.C. (Supp. V) 410(c). But the federal responsibility remains paramount; the Joint Board prepares a recommended decision for action by the FCC, and although state members of the Board may participate in the FCC deliberations on the recommendation, they may not vote on it. *Ibid.*

Act, the major substantive provisions of the common carrier title of the Act. 47 U.S.C. 152(b), 201-205.[3] By virtue of their participation in interstate service through interconnection, virtually all of the nation's telephone companies come within the FCC's regulatory jurisdiction under Sections 201 through 205.

B. FCC Regulation of Equipment Interconnection

The FCC and state regulatory agencies have coexisted under this scheme for more than 40 years. Common carriers have raised jurisdictional challenges to the FCC from time to time, particularly in cases involving facilities used jointly for interstate and intrastate communications. But the Commission has consistently exercised its jurisdiction insofar as the facilities are used interstate, recognizing that the states have concurrent jurisdiction to regulate the use of the same facilities for intrastate communications when the state regulations do not conflict with federal ones.[4] The courts have uniformly upheld the

[3] Section 201 requires carriers to furnish service on reasonable request, to interconnect with other carriers on FCC order, and to adopt rates, practices and regulations that are just and reasonable. Section 202 forbids unjust or unreasonable discrimination. Section 203 requires fully subject carriers to file schedules (tariffs) setting forth rates and practices for themselves and their connecting carriers. Sections 204 and 205 set forth the FCC's authority and procedures for scrutiny of tariffs and for the prescription of rates and practices binding on fully subject carriers and connecting carriers alike.

[4] See, *e.g.*, *AT&T (Mebane)*, 53 FCC 2d 473, affirmed *sub nom. Mebane Home Tel. Co.* v. *Federal Communications Commission*, 535 F.2d 1324 (C.A. D.C.); *Department of Defense*

FCC's exercise of this jurisdiction.[5] The FCC has thus from its inception regulated terminal equipment used in connection with the interstate network. In particular, it has established policies governing interconnection of that equipment with the network.[6]

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v. *General Tel. Co.*, 38 FCC 2d 803, affirmed *sub nom. St. Joseph Telephone & Telegraph Co.* v. *Federal Communications Commission*, 505 F.2d 476 (C.A. D.C.); *Carterfone*, 13 FCC 2d 420, reconsideration denied, 14 FCC 2d 571, on primary jurisdiction referral, *Carter* v. *AT&T*, 250 F. Supp. 188 (N.D. Tex.), affirmed, 365 F.2d 486 (C.A. 5), certiorari denied, 385 U.S. 1008; *Hush-A-Phone Corp.* v. *AT&T*, 22 FCC 112, on remand from *Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266 (C.A. D.C.); *Use of Recording Devices*, 11 FCC 1033, as modified, 12 FCC 1005; *Jordaphone Corp. of America* v. *AT&T*, 18 FCC 644; *Katz* v. *AT&T*, 43 FCC 1328; *AT&T (TWX)*, 38 FCC 1127; *AT&T (Railroad Interconnection)*, 32 FCC 337; *Fallon Travelodge* v. *Churchill County Tel. & Tel. System*, 14 FCC 2d 972; *Department of Defense* v. *AT&T (COPAN)*, 38 FCC 2d 819.

[5] See, *e.g.*, *AT&T (Mebane)*, *supra*; *Department of Defense* v. *General Tel. Co.*, *supra*. Cf. *Ambassador, Inc.* v. *United States*, 325 U.S. 317; *GTE Service Corp.* v. *Federal Communications Commission*, 474 F.2d 724 (C.A. 2); *General Tel. Co. of the Southwest* v. *United States*, 449 F.2d 846 (C.A. 5); *General Tel. Co. Calif.* v. *Federal Communications Commission*, 413 F.2d 390 (C.A. D.C.), certiorari denied, 396 U.S. 888; *Ward* v. *Northern Ohio Tel. Co.*, 300 F.2d 816 (C.A. 6), certiorari denied, 371 U.S. 820; *Hush-A-Phone Corp.* v. *United States*, *supra*; *MCI Communications Corp.* v. *AT&T*, 369 F. Supp. 1004 (E.D. Pa.), vacated on other grounds, 496 F.2d 214 (C.A. 3); *United States* v. *AT&T*, 57 F. Supp. 451 (S.D. N.Y.), affirmed *sub nom. Hotel Astor, Inc.* v. *United States*, 325 U.S. 837.

[6] The substantive interconnection policy, which, as petitioners concede, is not at issue in this case (Pet. No. 76-332,

The telephone companies have recognized that authority. They typically have filed equipment interconnection tariff restrictions (formerly known as "foreign attachment" provisions) with the FCC, and have filed conforming tariff provisions with the state or local agencies concerned. *E.g.*, *Carterfone*, 14 FCC 2d 149, stay granted 15 FCC 2d 31; *Telerent Leas-*

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p. 10; see Pet. No. 76-331, p. 2; Pet. No. 76-336, p. 2), is based on Section 201(b) of the Communications Act, 47 U.S.C. 201(b), which requires that charges, practices and regulations governing interstate communications be "just and reasonable." Section 201(b) gives rise to a right in telephone subscribers "reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." *Hush-A-Phone Corp.* v. *United States*, 238 F. 2d 266, 269 (C.A. D.C.). While early Commission precedent on interconnection recognized this right (*e.g.*, *Use of Recording Devices*, 11 FCC 1033), it received its most vigorous statement in the 1968 decision in *Carterfone*, 13 FCC 2d 420, reconsideration denied, 14 FCC 2d 571. The Commission there held that AT&T's tariff provision barring customers from interconnecting devices was an unreasonable restraint on customer freedom. *Carterfone* established the customers' right to interconnect their own equipment to the interstate network, so long as the interconnection will not harm the telephone company's facilities or employees, will not impair operation of the network, and will not interfere with the right of others to use the system. *Carterfone* was not appealed. AT&T instead filed tariffs with the FCC allowing subscribers to interconnect all types of equipment and communications systems to the public network. However, the new tariffs specified that direct electrical connection could be made only through a carrier-provided connecting arrangement. The Commission has found that requirement unduly restrictive. *Interstate and Foreign MTS and WATS*, 56 FCC 2d 593, under review as *North Carolina Utilities Commission* v. *Federal Communications Commission*, C.A. 4, No. 76-1002.

ing Corp., 45 FCC 2d 204, 217 (Pet. App. 24b). No conflict resulted because state and federal interconnection provisions were consistent.

C. The Telerent Order

Several terminal equipment manufacturers and distributors in 1973 called the FCC's attention to newly initiated actions by state regulatory commissions, which the complaining parties regarded as inconsistent with and potentially disruptive of the FCC's policies permitting telephone equipment interconnection to the interstate network.[7] In particular, they pointed to a rule proposed by the North Carolina Utilities Commission ("NCUC") which would generally prohibit the interconnection of customer-provided equipment to the systems of any telephone companies operating in North Carolina.[8] They also called attention to an opinion by the Nebraska attorney general advising the Nebraska Public Service Commission that any hotel or motel which furnished its own switchboard and other terminal equipment had to obtain a certificate of public convenience and necessity as if it were a communications common carrier, notwithstanding the interconnection policy set forth in *Carterfone*.[9] The complainants asked the Commis-

[7] *E.g., Carterfone*, 13 FCC 2d 420, reconsideration denied, 14 FCC 2d 571.

[8] The FCC later took official notice of a similar action by the Oklahoma Corporation Commission (Pet. App. 39b; 7a n. 1).

[9] The Nebraska Commission's subsequent action, taken on the basis of the state attorney general's opinion, was reversed by the Nebraska Supreme Court on grounds that the FCC's policy preempted inconsistent state actions. *Sherdon v. Dann*, 193 Neb. 768, 229 N.W. 2d 531.

sion to issue a declaratory order stating whether and, if so, to what extent its *Carterfone* pronouncement had preempted state action in this area. *Telerent Leasing Corp.*, 43 FCC 2d 487. The Commission invited comments from interested parties and held oral argument on the relationship of federal and state jurisdiction over terminal equipment interconnection. *Ibid.*

The Commission found that the actions by the state agencies in conflict with its own policies were "a source of great controversy and confusion for manufacturers and users" of customer-provided telephone equipment, and that they jeopardized the continuing viability of the federal policy of allowing the interconnection of equipment which does not endanger the technical integrity of the telephone system (Pet. App. 19b). The Commission concluded that a declaratory order as to the effect of such state actions was necessary to terminate the controversy and remove uncertainty.

On the merits, the Commission found:

1. that its authority to regulate interstate communications permits it to determine "the terms and conditions under which customers shall be reasonably permitted to use their own equipment" in connection with such communications (Pet. App. 25b);

2. that the FCC has consistently exercised jurisdiction over telephone equipment used in interstate communications notwithstanding the fact that the

same equipment serves intrastate purposes (Pet. App. 26b);

3. that the "commonality" and "indivisibility" of telephone equipment used for interstate and intrastate calls require that the rules governing interconnection be consistent for both jurisdictions (Pet. App. 26b); and

4. that Congress, in reserving state jurisdiction over intrastate communications, did not deprive the FCC of authority to regulate terminal equipment used commonly and indivisibly for interstate and intrastate communications (Pet. App. 23b-31b).

Accordingly, the Commission concluded (Pet. App. 31b):

> [T]his Commission has primacy in authority over the terms and conditions governing the interconnection of customer-provided equipment to the nationwide telephone network. No State regulation can oust this Commission from its clear jurisdiction over interstate communications and the regulation of the terms and conditions governing such communication, including the right of subscriber interconnections.

The Commission did not purport to occupy or preempt the entire area of terminal equipment regulation (Pet. App. 31b-33b):

> Although we have asserted Federal primacy in this area, it does not follow that the State commissions have no proper interest or that they are to be denied a participating role * * *. * * *
>
> * * * * *

> [O]ur actions do not foreclose any State from taking action of its own in the interconnect area so long as such action does not derogate the interstate ruling.

D. The Ruling Below

On petitions for review the court of appeals affirmed, with one member of the panel dissenting, in part.[10] The court rejected the notion that state regulation, "formally restrictive only of intrastate communication," could be allowed to frustrate valid federal policies governing interstate communication (Pet. App. 13a). It affirmed the FCC's determination that the actions of North Carolina, Nebraska and Oklahoma would have just such an effect. Thus, while it agreed with petitioners that the FCC has no regulatory power over intrastate services and facilities as such, it concluded that the FCC's assertion of primacy for its own interconnection policy was "reasonable administrative action within its statutory jurisdiction" (Pet. App. 9a-13a, 18a).

The court of appeals found support for its conclusions in (1) the express grant of authority to the FCC to regulate the facilities of interstate communications, 47 U.S.C. 151, 152(b), 153(a), (b), (e) and (f); (2) the fact that the FCC had exercised its jurisdiction over "terminal equipment used in con-

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[10] Because of potential conflicts of interest, all the active members of the Fourth Circuit except Judge Widener disqualified themselves. The majority of the panel consisted of Judge Hastie of the Third Circuit and Judge Tuttle of the Fifth Circuit.

nection with both interstate and intrastate communications" for almost 30 years without objection by Congress; (3) congressional recognition, elsewhere in the Act itself, of federal primacy in areas of common federal and state concern, 47 U.S.C. 410(c); (4) the fact that the Section 2(b) exemption of intrastate service from FCC regulation contains its own exception, subjecting "connecting" carriers to Commission authority under Sections 201 through 205 of the Act; and (5) legislative history establishing that the Section 221(b) exemption only bars the Commission from regulating service within a single telephone exchange that is technically interstate because the exchange spans a state border, as in Kansas City or Texarkana (Pet. App. 10a-18a).

ARGUMENT

The court of appeals' ruling, that the FCC's authority to regulate equipment used for interstate calls is not affected by the fact that the same equipment is also used for intrastate calls, conflicts with no decision of any other circuit or of this Court. Instead, it rests on a reading of the Communications Act that accords with the Act's purpose, structure, and legislative history, as well as with consistent FCC practice under the Act. A decision by this Court upsetting that consistent FCC practice, long approved by the courts and acquiesced in by Congress, would have far-reaching practical importance to the industry, the regulatory authorities, and the public which uses the telephone system. Any change of such

importance in the long-standing interpretation of the Act should come from Congress, not this Court. Indeed, petitioners support a bill introduced in the most recent session of Congress that would have the precise effect they urge this Court to reach by interpretation of the existing Act.[11] In light of the continuing legislative attention to this issue, there is no need for review by this Court.

A. The Purpose and Structure of the Communications Act

Congress established the Federal Communications Commission in 1934 and gave it a firm mandate "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *." 47 U.S.C. 151. It authorized the Commission to regulate not only interstate services, but also the facilities used to provide such services. 47 U.S.C. 152(a), 153(a), (b), (e), (f). Further to insure that its regulation was effective, Congress expressly made Sections 201 through 205 applicable to local telephone companies providing interstate service only through connection to other telephone companies. 47 U.S.C. 152(b).

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[11] S. 3192, 94th Cong., 2d Sess. (1976); H.R. 12323, 94th Cong., 2d Sess. (1976). The bills would specifically deprive the FCC of authority to regulate terminal equipment. Hearings were held on September 28, 29 and 30, 1976, before the Communications Subcommittee of the House Interstate and Foreign Commerce Committee; the bills are expected to be reintroduced in the next session of Congress.

All the telephone companies that are parties to this case are "integrated into the national network and subject to the provisions of section 201 through 205" (Pet. App. 10a). The Commission's equipment interconnection policy and rulings are directly applicable to such companies because they arise from the requirement of Section 201 of the Act that charges and practices (including restrictions on interconnection) be "just and reasonable." See *Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266, 268 (C.A. D.C.).

Nonetheless, AT&T and the other petitioners assert that Sections 2(b) and 221(b) of the Act, 47 U.S.C. 152(b) and 221(b), immunize telephone companies from federal regulation of the facilities used for interstate communication, so long as those same facilities are also used for intrastate communication. This interpretation is unsound. Facilities used to make and receive both interstate and intrastate calls are indisputably facilities used in interstate communication (Pet. App. 9a). Reading Section 2(b) to deprive the Commission of the authority to regulate these facilities would frustrate the Act's overall aim, "to make available, * * * to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." Congress intended that the interstate and international communications network be subject to national control, and it gave the Commission the power to assert

that control. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157. The consequence of the petitioners' argument, however, would be that the terms of interconnection to the national and international telephone network would be controlled, not by the FCC, but by the fifty individual states. However, "fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication." *General Tel. Co. Calif.* v. *Federal Communications Commission*, 413 F. 2d 390, 401 (C.A. D.C.), certiorari denied, 396 U.S. 888. If the petitioners were correct, the national telephone network would be unprotected from incapacitation by States and localities exercising economic or technical regulation of facilities that are used for intrastate as well as interstate communication.[12] As the Nebraska Supreme Court stated last year in describing the consequences of petitioners' position, "[s]uch a result is, we believe, legally, logically, and practically unsupportable." *Sherdon* v. *Dann*, 193 Neb. 768, 774, 229 N.W. 2d 531, 535.[13]

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[12] For example, the Commission would be powerless to protect the network if a state regulatory commission should decide to improve local service by requiring or allowing the interconnection of equipment which because of electrical properties could damage the national network.

[13] It is not accurate to suggest, as does petitioner NCVC (Pet. No. 76-331, pp. 30-35), that interstate service is "merely incidental" to the primary responsibility of the industry, and thus that local, rather than federal, regulation should be preferred. Although the total number of interstate calls made

The petitioners' reading of the Act not only misconstrues Section 2(b), it also misconstrues Section 221(b). As the court below correctly noted, Section 221(b) "is intended to do no more than to prevent the circumstance that a single telephone exchange serves an area that includes parts of more than one state from enlarging the jurisdiction of FCC over the business and facilities of that exchange" (Pet. App. 17a). Thus the function of Section 221(b) is limited to withdrawing from Commission regulation service within a single exchange that is literally interstate because the exchange overlaps state boundaries.[14] But

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may be small in comparison to the number of intrastate calls (Pet. No. 76-331, pp. 25, 31; Pet. No. 76-332, pp. 2, 6), their importance to the industry and the national communications system is more accurately reflected by the fact that almost $9.5 billion, or 30 percent of total telephone industry revenues, came from interstate or foreign calls in 1975. Statistics of Communications Common Carriers, FCC, year ended December 31, 1975 (to be published late in 1976). In any event, such considerations could not affect the primacy of federal legislative authority under the Supremacy Clause of the Constitution.

[14] Congressman Rayburn, floor manager of the 1934 bill in the House, explained that Section 221(b) is "designed to cover cases of cities located within two States, as Texarkana." 78 Cong. Rec. 10314 (1934). The rest of the legislative history confirms this intent. See S. Rep. No. 781, 73d Cong., 2d Sess. 5 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 7 (1934). Indeed, AT&T conceded, in oral argument before the Commission below, that Section 221(b) is not applicable to this situation (Pet. App. 25b, n. 21a; Tr. 102-103). The two cases on which it relies do not support its position here. *Southwestern Bell Tel. Co.* v. *United States*, 45 F. Supp. 403 (W.D. Mo.), involved an FCC attempt to regulate exchange service in the Kansas City exchange, which, like that in Texarkana, spans a state border. *Kitchen* v. *Federal Communications Commission*,

while Section 221(b) does not derogate from the Commission's authority in this case, it does undermine petitioners' construction of Section 2(b). If petitioners' reading of Section 2(b) were correct, there would be no need for the exemption in Section 221(b), for the telephones within a single exchange which covers two States are also facilities used for intrastate communication and thus would be immune from Commission regulation under Section 2(b) alone.[15]

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464 F. 2d 801 (C.A. D.C.), affirmed the Commission's ruling that it lacked jurisdiction to halt construction of a building designed to hold a telephone exchange facility because such a building is not a "line" within the meaning of Section 214, 47 U.S.C. 214. The court's subsequent statement that Section 221(b) also bars FCC jurisdiction is dictum. In any event, the objections in *Kitchen* to the construction of an exchange building in a residential area were more appropriately heard by a local zoning board than a federal regulatory agency; in contrast, the issues involved here relate directly to the Commission's responsibility for the effectiveness of the national telephone system, and thus are entirely appropriate for its consideration.

[15] There is no merit in AT&T's similar argument (Pet. No. 76-332, pp. 27-28) that petitioners' construction of Section 2(b) is necessary to give meaning to the exclusion of Section 301, 47 U.S.C. 301, from the reservation of state authority over purely intrastate operations. Section 301 requires a Commission license to engage in radio transmission, an activity that Congress meant the Commission to regulate even when that transmission was wholly intrastate. Thus Section 2(b) refers to Section 301 to make clear that all radio operation, even that used exclusively intrastate, is within the Commission's regulatory power. There is no similar reference to the other grants of Commission jurisdiction, since wire communication and equipment used exclusively intrastate are not within the Commission's regulatory authority.

B. The Legislative History of the Communications Act

Contrary to petitioners' contention that the decisions below are at odds with the Act's legislative history (Pet. No. 76-332, pp. 29-30; Pet. No. 76-331, pp. 35-40; Pet. No. 76-336, pp. 15-16), that history does not indicate a congressional intention to deprive the FCC of authority over terminal equipment used in interstate communications. The discussion of *Houston, E & W Texas Ry.* v. *United States*, 234 U.S. 342 ("the *Shreveport* case"), upon which petitioners rely, reflects concern on the part of some legislators and some witnesses at the hearings about federal intrusion into purely intrastate matters. They read the *Shreveport* case as authorizing the Interstate Commerce Commission to regulate purely intrastate rates by virtue of their indirect effect on interstate commerce, and sought to avoid giving similar power over purely intrastate matters to the communications commission then being established. The means chosen for avoiding that result was the explicit reservation in Section 2(b)(1) of purely intrastate matters to local regulatory bodies. But that rationale for Section 2(b)(1) does not justify giving it the expansive reading petitioners urge; it does not reserve matters involving both interstate and intrastate concerns exclusively to State regulation.

Instead, the legislative history indicates Congress intended to create an effective federal commission, one capable of implementing a unified national communications policy unhampered by potentially conflicting local policies. See, *e.g.*, 78 Cong. Rec. 8822

(1934) (remarks of Senator Dill). The local policies prohibiting use of independent terminal equipment present precisely such a conflict; if such equipment cannot be installed and used in connection with intrastate calls, it will not be installed on the same line for use in interstate calls, and the Commission policy permitting its use for interstate calls will be directly frustrated. Because of this direct and substantial effect of the local policy on interstate communications, the question of the applicability of the *Shreveport* doctrine—dealing with the indirect effects of local regulations on interstate commerce—is simply not involved in this case.

C. Consistent Commission Practice

Petitioners incorrectly suggest that the Commission has reversed itself in asserting jurisdiction over terminal equipment and has displaced long-standing state regulation (Pet. No. 76-331, pp. 16-19; Pet. No. 76-332, p. 35; Pet. No. 76-336, p. 20). On the contrary, as the court of appeals found (Pet. App. 15a-16a), "for some 30 years FCC has viewed and treated section 2(b)(1) * * * as imposing no bar to its exercise of jurisdiction over facilities used in connection with both intrastate and interstate telephone communications." The cases in which the Commission has exercised that jurisdiction are numerous. See *Southwestern Bell Telephone Co.*, 6 FCC 529, and cases cited at pp. 5-6, note 4, *supra*, and Pet. App. 26b-29b. AT&T in particular has included restric-

tions on the use of terminal equipment in its interstate tariffs since before the FCC was created in 1934; those provisions have been the subject of Commission scrutiny a number of times. *E.g.*, *Hush-A-Phone* v. *United States*, *supra*. The Commission nearly thirty years ago made plain its judgment that it has authority over equipment used in connection with both interstate and intrastate calls, when in 1947 it rejected an AT&T argument similar to that now advanced. *Use of Recording Devices*, 11 FCC 1033, 1047.[16]

Later, AT&T itself successfully asserted that the FCC had primary jurisdiction over a dispute involving the use of attachments to terminal equipment. The *Carterfone* case began as an antitrust suit by the makers of a device to be attached to a telephone to increase its usefulness. The case was referred by the district court to the Commission on AT&T's motion (*Carter* v. *AT&T*, *supra*). AT&T, not the Commission, has thus reversed itself in now asserting that the Commission has no jurisdiction over matters re-

[16] The Commission stated (*ibid.*):

> [T]he Bell System argument ignores the real consideration that interstate and foreign message toll telephone service requires the use of facilities that are not "exclusively interstate." This service necessarily involves all the facilities, charges, classifications, practices, services, and regulations used in the rendition of the service, and regulation of such service must be able to deal with all or any of the matters so involved if it is to be effective. This is clearly the purport of the comprehensive common carrier provisions of the Communications Act.

lating to terminal equipment used for both interstate and intrastate calls (Pet. App. 11a n. 5).[17]

Nor does the instant decision represent a novel attempt by the FCC to displace state regulation. It is true that federal and state regulation of equipment used for both interstate and intrastate calls has coexisted for many years. Because the state agencies and the telephone companies have heretofore acquiesced in the FCC regulation of terminal equipment interconnection by conforming the state policies with the federal policies, there has been no conflict necessitating a declaration of federal primacy. For example, when the Commission in *Carterfone* directed AT&T to file new tariffs modifying earlier restrictions on the use of attachments to terminal facilities for interstate calls, AT&T recognized that uniform practices were required, and filed conforming tariffs with the state commissions covering such use on intrastate calls. The state tariffs reflected the interstate ones; no conflict resulted.

The instant case has arisen because now, for the first time, certain states are considering or have adopted policies governing intrastate use of equipment that are inconsistent with the Commission policies for use of the same equipment in connection with interstate calls. The Commission and the court of appeals resolved the federal-state conflict thus created in favor of federal jurisdiction. This result is plainly correct, for, under the Supremacy Clause of

[17] Cf. *Phonetele, Inc.* v. *Public Utilities Comm'n*, 113 Cal. Rptr. 16, 20 n. 3, 520 P.2d 400, 404 n. 3 (Sup. Ct.).

the Constitution, a valid federal regulatory statute is supreme over inconsistent state law. *Hines* v. *Davidowitz*, 312 U.S. 52; *Farmers Union* v. *WDAY*, 360 U.S. 525. Petitioners offer no authority supporting proper resolution of such a conflict in any other fashion.

The remedy for dissatisfaction with Commission policy and its supremacy over contrary state policy lies not in this Court, but in Congress, where petitioners are urging the adoption of legislation that would overrule the decision below (see note 11, *supra*, p. 13). Whether petitioners will ultimately be successful in that effort or whether Congress will decide instead not to disturb the division of authority currently reflected in the Communications Act as consistently interpreted by the FCC, there is no need for review of the present case by this Court.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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